INDEX

	Page
Question Presented	1
Rules Involved	2-3
Argument	3-5

TABLE OF CASES

Bowman v. Bowman, 178 P. 2nd 751, 29 Cal. 2d 808	4
Deena Products Co. v. United Brick & Clay Workers of America, C.A. Ky., 1952, 195 F. 2d 612, Certiorari Denied 73 S. Ct. 21, 344 U.S. 822, 97 L. Ed. 640	5
Hill v. Hawes, 320 U.S. 520	3
Principale v. Associated Gas & Electric Co., C.A. N.Y., 1951, 192 F. 2d 1016, Certiorari Denied 72 S. Ct. 1034, 343 U.S. 942, 96 L. Ed. 1347	5
Ray v. Morris, C.A. Ill., 1948, 170 F. 2d 498	5
Slater v. Peyser, 91 U.S. App. D.C. 314, 1952, 200 F. 2d 360	5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No.

LEONARD C. EDWARDS,
Petitioner,

v.

VELVAC, INC. and WALLER CARSON,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Can Rule 60(b) F.R.C.P. be used after trial to relieve Petitioner from a final judgment duly entered when the only alleged inadvertence or excusable neglect was Petitioner's failure to file a timely notice of appeal pursuant to Rule 73(a)?

RULES INVOLVED

Federal Rules of Civil Procedure:

"RULE 60. RELIEF FROM JUDGMENT OR ORDER

* * * *

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On Motion and upon such terms as are just, the court

may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . ."

"RULE 73. APPEAL TO A COURT OF APPEALS

"(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed."

"RULE 59. NEW TRIALS; AMENDMENT OF JUDGMENTS

* * * *

"(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

"RULE 6. TIME.

* * * *

"(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period orig-

inally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59 (b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them."

ARGUMENT

After trial, Petitioner filed his Notice of Appeal late. Petitioner is attempting to use Rule 60(b) to circumvent the appeal time requirement of Rule 73(a) by having the judgment vacated and reinstated in essentially the same form. The District Court recognized this attempt. Clerical errors or failure to receive timely notice of entry of judgment are not involved in this case. Neither this Court nor any other Federal Court has ever held that where there has been a delay due to neglect in filing a Notice of Appeal, the judgment should be vacated and reinstated so as to revive the right of appeal. *Hill v. Hawes,* 320 U.S. 520, the sole Federal case cited by the Petitioner in support of his argument, is not in point since judgment was vacated not under the provisions of Rule 60(b), but under the only exception to the thirty-day requirement of Rule 73(a), excusable neglect based on a failure to learn of the entry of judgment.

Rule 73(a) specifically limits the time for filing a Notice of Appeal to thirty days after entry of judgment and provides no exception that can be used in the case before the court. Rule 59(e) allows only ten days after entry of judgment in which to move to amend or alter a judgment. Rule 6(b) provides that the time requirements of Rule 73(a) and 59(e) can not be enlarged.

These rules should not be circumvented by a misuse of Rule 60(b). Rule 60(b) provides that a court "may relieve" a party from the oppression of a final judgment upon a proper showing. Petitioner's motion, while it did move that the final judgment be vacated and amended, also asked that an identical judgment be reinstated. The burden of the final judgment would still be in operation.

Petitioner claims that no Federal Court has ever decided the question presented. It is obvious that the rules above set forth are so clear that no judicial interpretation is needed. Respondent's attorneys have checked to the best of their knowledge all cases where judgments have been vacated by excusable neglect, mistake, inadvertence or surprise under Rule 60(b). In all cases where the judgment was vacated, the judgment was a default judgment or the action had been dismissed without having been tried. No case could be found where the judgment was vacated after an action had been tried and the Notice of Appeal had been filed late.

Petitioner further claims that the California Supreme Court's interpretation of Section 473, California Statutes, which Petitioner claims is similar to Rule 60(b) F.R.C.P. is favorable to Petitioner's argument. However, none of the California cases cited by the Petitioner on page 6 of his brief involves the late filing of a Notice of Appeal. The procedural defects in these California cases involved either certification of transcripts, insufficient records before the court, or reliance upon defective orders. No California case can be found vacating a judgment after the case had been tried on its merits and a Notice of Appeal was not filed on time. In *Bowman v. Bowman,* 178 P. 2nd 751, 29 Cal. 2d 808, the Court held that the purpose of Section 473, California Statutes, in authorizing relief from a judgment, etc., taken through mistake,

inadvertence, surprise or excusable neglect was to enable a party to proceed on merit.

Under Rule 73(a) F.R.C.P., the court loses jurisdiction when a Notice of Appeal is filed late. The cases are clear that failure to take an Appeal within the time prescribed is jurisdictional and mandatory and the prescribed time cannot be extended by waiver or order of court.

Deena Products Co. vs. United Brick & Clay Workers of America, C.A. Ky., 1952, 195 F. 2d 612, Certiorari Denied 73 S. Ct. 21, 344 U.S. 822, 97 L. Ed. 640.

Principale vs. Associated Gas & Electric Co., C.A.N.Y. 1951, 192 F. 2d 1016, Certiorari Denied 72 S. Ct. 1034, 343 U.S. 942, 96 L. Ed. 1347.

Slater vs. Peyser, 91 U.S. App. D.C. 314, 1952, 200 F. 2d 360.

Ray vs. Morris, C.A. Ill., 1948, 170 F. 2d 498.

It is respectfully submitted that the petition for writ of Certiorari should be denied and that Respondents be awarded their costs.

Respectfully submitted,

IRA MILTON JONES,
Counsel for Respondents,
Velvac Inc. and Waller Carson,
110 E. Wisconsin Ave.,
Milwaukee 2, Wis.

Of Counsel:
IRVING A. PUCHNER,
WILLIAM E. SHAW.